UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
LISA ROBINSON SPRINGER,

PLAINTIFF,

-against- Case No:
10 Civ. 6538

DL PETERSON TRUST, STEPHANIE R. CEDRO
and MERCK & CO., INC.,

DEFENDANTS.
---X

DATE: FEBRUARY 27, 2012

TIME: 12:47 P.M.

VIDEOTAPED DEPOSITION of

PETER L. VARRIALE, M.D., a Nonparty Witness, taken by the Respective Parties, pursuant to a Notice and to the Federal Rules of Civil Procedure, held at the offices of Peter L. Varriale, M.D., before Mary Robold, a Notary Public of the State of New York.

A P P E A R A N C E S:

JAROSLAWICZ & JAROS, LLC
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New York, New York 10041
BY: GREGORY E. WALTHALL, ESQ.

ALSO PRESENT:

Mauricio Quintero - Videographer
Diamond Reporting & Legal Video

* * *

F E D E R A L S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the counsel for the respective parties herein that the sealing, filing and certification of the within deposition be waived; that the original of the deposition may be signed and sworn to by the witness before anyone authorized to administer an oath, with the same effect as if signed before a Judge of the Court; that an unsigned copy of the deposition may be used with the same force and effect as if signed by the witness, 30 days after service of the original & 1 copy of same upon counsel for the witness.

IT IS FURTHER STIPULATED AND AGREED that all objections except as to form, are reserved to the time of trial.

* * * *

THE VIDEOGRAPHER: This is tape one. We're now on the record at 12:47 p.m., Monday, February 27, 2012.

This is the deposition of Dr. Peter Varriale in the matter of Springer versus Merck. This deposition is being held at the offices of Dr. Varriale, located at 601 North Franklin Avenue, Garden City, New York.

The court reporter is Mary Robold. I am the legal videographer, Mauricio Quintero.

Will counsel please introduce themselves for the record.

MR. SACKS: My name is Bradley Sacks, S-A-C-K-S, attorney for the plaintiff.

MR. WALTHALL: My name is Greg Walthall, that's W-A-L-T-H-A-L-L, from the law firm of Hoey, King, Epstein, Prezioso & Marquez, and I represent Defendants Stephanie Cedro

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and Merck & Company, Incorporated.

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

THE COURT REPORTER: Dr. Varriale, please raise your right hand.

Do you swear or affirm the testimony you are about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, I do.

EXAMINATION BY
MR. WALTHALL:

Q. Good afternoon, Dr. Varriale.

A. Hello.

Q. My name is Greg Walthall. Have we met before today?

A. Not in person.

Q. Did we have one telephone conversation about this case?

A. Yes.

Q. Okay. And my office has retained you to, to examine Miss Springer

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in connection with this lawsuit?

A. Yes.

Q. Okay. And now, I just called you Doctor, can you explain to me what that means or what kind of doctor you are?

A. I'm a medical doctor. It's a, it's a person who needs to complete certain qualifications to get a license and degree.

Q. And when you say "certain qualifications," is there an educational component?

A. Yes.

Q. Can you just briefly describe what your educational background is?

A. I went to Hofstra University for four years, and then I went to Downstate Medical School, graduating in 1979, then I spent one year in general surgery at Nassau County Medical Center, and then I spent four years in the Bronx at Jacobi Hospital, Montefiore Medical Center as a resident in orthopedic surgery.

Q. When you said you're a resident in orthopedic surgery, what did that entail?

A. That's a training program where you learn how to become an orthopedic surgeon. It's, it's, essentially, you learn how to make orthopedic diagnoses, you learn how to do orthopedic physical exam and how to do orthopedic surgery.

Q. So you're an orthopedic surgeon?

A. Yes.

Q. And how long have you been an orthopedic surgeon?

A. Since 1984.

Q. Are you board certified?

A. Yes.

Q. What does it mean to be board certified?

A. Again, you have to finish your qualifications of doing the four years of orthopedic residency, the one year of general surgery, and then you have to be in practice for two years, and then you have to pass an oral exam, you have to pass a written exam, and you have -- your director

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of your residency program has to approve you for becoming board certified.

Q. And can you tell us what the oral exam entails, do you go before a group of people, one person, what do you do?

A. It's actually a series of about, it's a series of five doctors. They're, you know, you get examined by one, then when you get finished you get examined by the next. It's about a three- or four-hour process.

Q. And what board is it that certifies you?

A. It's the American Board of Orthopedic Surgery.

Q. And you have been board certified since about 1984?

A. Since 1986.

Q. 1986, excuse me.

MR. WALTHALL: At this time, I would offer the witness, Dr. Peter Leo Varriale, as an expert witness.

MR. SACKS: I'm sure the court will rule.

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MR. WALTHALL: Okay.

Q. Dr. Varriale, you said you've been in practice since about 1986 or 1984?

A. Eighty-four.

Q. Okay. And during that practice have you always been an orthopedic surgeon?

A. Yes.

Q. And as an orthopedic surgeon, can you tell us some of the things -- do you specialize in certain things other than just general orthopedics?

A. I'm essentially a general orthopedic surgeon. I treat all parts of the body, but I restrict my surgery to certain parts of the body; in other words, I do not do surgery of the spine, I do not do complicated hand or foot surgery. Otherwise I do all the other surgeries.

Q. Would that include shoulders, knees?

A. Correct.

Q. Feet?

A. Yes.

Q. Okay. Dr. Varriale, did you

have an opportunity to examine Lisa Robinson Springer in connection with this case?

A. Yes.

Q. Can you tell us what date that exam was?

A. June 7, 2011.

Q. Okay. And how was it that you came to examine Miss Springer in connection with this case?

A. She was referred to me through a intermediary company, I believe.

Q. Okay. And do you know whether or not my office retained that intermediary company or --

A. I believe so.

MR. SACKS: Objection.

Q. When you were retained to examine Miss Springer in relation to this case, did I speak to you before you conducted that examination?

A. No.

Q. Did you consult with any other medical professionals before you conducted

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Miss Springer's examination?

A. No.

Q. What was the date that you examined Miss Springer?

A. June 7, 2011.

Q. Was it here in your office in Garden City, Long Island?

MR. SACKS: Objection to the leading.

A. She was examined in New York City.

Q. Okay. And when you examine someone for this type of, for a litigation-type case, what is it that you do?

A. I take a history, do a physical examination, review records.

Q. When you say "take a history," what do you mean?

A. I ask the claimant about how the accident happened, how she felt around the accident, where she went the day of the accident, other doctors she visited after the accident, any tests that she's had done, any procedures she's had done, how she's feeling with all her injuries, and any past medical history, any medications she's taking. Those types of things.

Q. And when you started to talk to Miss Springer about this to take a history from her, did she provide a full history for you?

MR. SACKS: Objection to the leading, objection to the form.

A. She would, as per her attorney, she would only allow me to ask questions about her injuries -- about which part of the body hurts.

Q. Now, when you say "as per her attorney," was her attorney present during the examination?

A. I don't believe so.

Q. Do you know whether or not she told you that her attorney told her that?

MR. SACKS: Objection, his answer speaks for itself.

A. Yes, she told me that her attorney told her not to -- only to answer

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questions about her physical injuries.
Q. Okay. And when you conducted the physical examination of Miss Springer, can you tell us what you did, what you examined her -- how you examined her, physically, what did you ask her to do?
A. Well, when I examined the neck, I asked her to move her neck, I ask her to resist my hand to test the muscle strength, I ask her -- I touch different parts of her extremity to, upper extremity, to test for how she's feeling; in other words, the sensation.
Q. Doctor, I just want to interrupt you for a second. When you say "upper extremity," do you mean her arms, her legs or something else?
A. Her arms.
Q. If you could continue.
A. And I do a reflex; in other words, I take a reflex hammer and, for the neck I would test the reflex in the elbow, in the back of the elbow.
Q. And a reflex hammer, those are

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the little hammers they used to use on, like, Fred Flintstone or something --

MR. SACKS: Objection to the form of the question.

Q. -- to see whether or not there were reflexes in the knee or something like that, correct?

MR. SACKS: Fred Flintstone used a large hammer.

MR. WALTHALL: It was a large hammer in Fred Flintstone.

Q. But you would use one of the smaller hammers, correct?

A. Yes.

MR. SACKS: Why don't you have the doctor describe what he used.

Q. Can you describe for us what you used, Doctor?

A. Well, it's a small metal handle about four inches, and it has a triangular rubber piece on the top, and you use the rubber piece to tap on certain parts of the body to see if the body is reacting to this, to this, you know, to this tapping on

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the tendons.

Q. I interrupted you with my question about the hammer. Did you complete your answer or had you completed --

A. I'm sorry, what was the question?

Q. The question is, what did you do physically when you were doing the examination of Miss Springer, physically, what did you do?

A. I would take the reflex hammer, this is the examination of the neck, and I would, again, tap on her biceps tendon and her triceps tendon to elicit, you know, reflexes.

Q. And were there any -- did you do any kind of physical examination for her back that differed from the things that you've already explained to us?

A. It's essentially the same. Except, I'm sorry, except you're examining the legs instead of the arms.

Q. Okay. And when you say

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"examining the legs," you then use the reflex hammer to test those reflexes as well?

A. Correct.

Q. And did you examine her shoulder?

A. Yes.

Q. What did you examine on her shoulder?

A. You mean how I --

Q. Yes, physically how you did it, I'm sorry.

A. I would ask her to move her arm, her shoulder, this is shoulder joint (indicating). I would ask her to move her arm as high as she can go, move her arm out, that's external rotation, move her arm in, that's internal rotation. I would use my fingers and press on her shoulder and ask her if it hurts. And I would test for strength, again, I would test for strength of internal rotation by resisting, she would -- I ask her to push out, and I would resist her to see what her strength is. I

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would resist her biceps to see what the biceps strength is, and I would resist her extension to see what that muscle strength was like (indicating).

Q. Now, when you took the history from Miss Springer, what did she tell you was wrong with her?

A. She claimed of pain in her neck, her lower back. The low back pain was radiating to her arms and legs, and she says that all her extremities, both arms and both legs, were numb.

Q. And did she say any specific portions of her arms and legs were numb or the entire arm and the entire legs?

A. I don't have that specifically written in my record, but from that last statement that she said all her extremities are numb, I would assume all the extremities, but again, that's an assumption. I'm not exactly sure what she said at that time.

MR. SACKS: I move to strike anything after the word "assumption."

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Q. Now, you also, as a component of your examination of Miss Springer, you also reviewed her medical records, correct?

A. Correct.

Q. And you reviewed medical records from the time of this accident and on?

A. Yes.

Q. And do you know which medical records you reviewed?

A. Multiple medical records.

Q. Okay. Did you prepare a report in relation to your examination of Miss Springer?

A. Yes.

MR. SACKS: Just yes or no.

Q. I get to ask the questions.

A. Yes.

MR. SACKS: This is for trial, so just so we're clear, the report's not in evidence, and if he's going to do anything with it, have it done properly, please.

MR. WALTHALL: Duly noted.

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MR. SACKS: Thank you.

Q. In the report that you prepared, did you list the medical records?

MR. SACKS: Objection. You're referring to the content of something that's not going to be in evidence.

Q. Are the medical records that you reviewed listed in your report?

MR. SACKS: Objection, again, you're referring to a document that's not going to be in evidence.

MR. WALTHALL: It remains to be seen whether it will be in evidence.

You could answer.

A. Yes.

MR. SACKS: Objection. Have you listed on the pretrial order that it's going to be in evidence?

MR. WALTHALL: The report itself was put into the pretrial order.

MR. SACKS: And it's not objected to?

MR. WALTHALL: No.

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Q. Doctor, can you explain to us, I want to go to the time when you did the exam of Miss Springer, what did you find when you examined her?

A. Well, when I examined her neck, she would only move her neck in five degrees, which is, essentially, moving your, say -- this is flexion. She would only move her neck five degrees, which is, essentially, like that, in flexion. Extension, this is extension, she would move her neck back, again, five degrees. When asked to turn her head to the left, which is this, she would turn to her left five degrees, which is like that. When asked to her turn her head to the right, which is that, she would turn her head five degrees, which is that, to the right (indicating).

There was no spasm and no tenderness on palpating or pressing on the neck. There was full strength of all muscle groups; in other words, I tested her biceps, her triceps and the little muscles

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of the hand. They had full strength. All her reflexes were normal. And when I touched her skin with my hand, that's how I test for sensation, light touch, it's called light touch, when you just take your hand and gently brisk it across the skin, she had normal sensation (indicating).

She had a negative Sperling's test, which is a provocative test. What I mean by that is you would tilt the head one way or the other to try to stimulate a nerve that would be irritated, and that was negative; in other words, it was normal. There was no indication that she had any nerve irritation going down her arms.

Q. Now, when you said there was no spasm and no palpation, can you explain to us what you found, what you mean when you say there was no spasm and what you did to discern that?

MR. WALTHALL: Objection to form.

A. I would press on the muscles behind the neck and see if they were

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supple; in other words, soft, or see if they were tight and tense, and they were soft, there was no tenseness or spasm, we would call it. A spasm muscle is one that's tight and pretty firm.

Q. So you physically put your hands on her neck to feel whether or not there was a spasm there?

A. Correct.

Q. Now, when you say there was no palpation, can you tell us what you did to discern there was no palpation?

A. I'm not sure what you mean by that.

Q. Well, one of the things you said was there was no palpation and spasm.

A. No tenderness.

Q. No tenderness, I'm sorry.

And how did you discern that there was no tenderness?

A. Well, when I pressed on her neck I would ask her if it hurts, and she said no.

Q. Thank you.

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And can you describe to us what you did when you did the physical exam to check for her leg and back, for her lower back?

A. For her lower back I would ask her to bend forward; in other words, in a standing position, I would -- it's like bending forward to try to touch your toes. For her, she would only bend 10 degrees, which is, say this is -- I'm standing up, and this is 90 degrees bending, trying to touch your toes, 90 degrees bending forward. I'll show you.

Standing up, bending forward to 90 degrees is that (indicating). When I asked her to bend, she would bend 10 degrees, which is like that (indicating). When asked her to extend her back, which is extension, she wouldn't extend at all.

There was no spasm or tenderness to the lower back. There was -- when I examine for sensation, which, again, is the light touch, rubbing against the skin very lightly, she said her whole left

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leg had decreased sensation. There was full strength of all the muscles in the lower extremity.

Essentially, I test the quadriceps muscle, which is the front of the thigh, the hamstring muscles, which is the back of the thigh, I test the muscles in the lower leg by asking them to bring their foot up, and I test the back of the lower leg, like the calf, by asking them to point the toe down. And I had my hand there feeling how much pressure that she can put when I test these four muscle groups. And then again the reflexes, which is using the hammer to test if the nerve pathways are functioning properly from the leg and into the back, everything -- those reflexes were normal.

Q. Doctor, you also performed a physical examination of Miss Springer's shoulder, correct?

A. Yes.

Q. Which shoulder did you examine?

A. Her right shoulder.

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Q. And what did you do when you did that exam?

A. Well, I asked her to abduct her arm, which is, normal abduction is bringing the arm all the way up, and when I asked her to do that, she could lift her arm like that (indicating).

Q. About how many degrees would you quantify?

A. About 30 degrees. That's about there (indicating).

When asked to externally rotate the arm, normal is about 80, she would only rotate -- I mean she could rotate normally, that's 80 degrees, external rotation, and this is 90 degrees of internal rotation, and she could do that (indicating). Normally.

Also I tested for strength of internal and external rotation, and I put my hand here and asked her to push in, I put my hand on the outside, asked her to push out, and she had normal strength. She also had normal strength when I tested the

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biceps and pushing down, which is testing back here, and she had normal strength there (indicating). And when I touched the shoulder and asked if it hurts, she said no.

Q. Doctor, after examining Miss Springer and reviewing her records and taking a history from her, were you able to reach a conclusion, within a reasonable degree of medical certainty, as to her condition?

A. Yes. Well, I believe there was significant malingering during the physical examination. What I mean by that is that her physical examination did not correlate with other parts of her physical examination, and after reviewing all of her medical records, again, her physical examination did not correlate with the medical records; therefore, I felt there was significant malingering. We also call it symptom exaggeration.

Also, when she exited the room, she said she could not open the doorknob, and someone had to open the doorknob for her, which, I believe is, to me, obvious malingering.

Q. And when -- go ahead, I'm sorry.

A. The other, based on the fact that I felt that she was malingering, it is difficult to really assess someone's problem, but to my best of my ability, I felt that she had resolved her cervical and lumbar strains, and she had resolved her right shoulder strain.

Q. Now, Doctor, with a reasonable degree of medical certainty, and after reviewing Miss Springer's medical records, after performing a physical examination of her, did you determine -- do you have an opinion as to whether or not she required surgery for any injury she sustained in this accident?

A. No.

Q. And when you say "no," why, what do you base that on?

A. Again, I believe her diagnosis,

to the best of my ability, is a resolved cervical strain, a resolved lumbosacral strain and a revolved strain to her right shoulder. And neither one of those diagnoses requires surgery.

Q. In reviewing her medical records, did you have an opportunity to review the records from Dr. Aric Hausknecht?

MR. SACKS: Objection. Objection to anything that's not specifically set forth in his report. I'm going to ask for a ruling. I'm not going to permit him to go into things that are not covered in his report.

Is Dr. Hausknecht's records something he reviewed and listed in his report?

MR. WALTHALL: Yes.

MR. SACKS: Could you just, under the review of -- just maybe go off the record for a moment.

THE VIDEOGRAPHER: We are off

the record at 1:09 p.m.

(Whereupon, an off-the-record discussion was held.)

(Whereupon, Dr. Varriale's report was marked as Defendants' Exhibit A for identification as of this date by the Reporter.)

THE VIDEOGRAPHER: On the record at 11:17 a.m.

MR. SACKS: I'm objecting to the question that was just posed on the grounds that the doctor's Rule 26 report makes no reference to reviewing any records of a Dr. Hausknecht. And I'm reserving the right to assert that in front of the judge, but the examination of the witness may continue.

A. I did examine the report from Dr. Hausknecht.

Q. Can you tell us what date that was?

A. June 9, 2011.

Q. And was there anything that you

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observed about the examination that was conducted by Dr. Hausknecht that was different from the examination that you performed on Miss Springer on June 7th of 2011?

A. Well, she had significantly more motion when Dr. Hausknecht examined her two days later. She was able to flex her neck fully to 60 degrees, extend her neck fully to 60 degrees, she was able to rotate her neck to approximately 60 degrees in both directions, normal is 80 degrees, and on her lower back, when she was asked to bend forward, she could bend forward to 70 degrees, again, normal bending is 90 degrees, and she could flex to 70 degrees (indicating).

Q. And for you how much did she flex?

A. Ten degrees.

Q. Ten degrees. And was there anything else that you noticed that contrasted with the physical examination that you conducted on June 7th of 2011 and

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Dr. Hausknecht's as recorded on his report dated June 9th of 2011?

A. I mean he examined all her extremities for sensation, and he said all the sensation was normal. When I examined her, she said her whole left leg had decreased sensation.

Q. Doctor, you mentioned in your report, you indicate that the plaintiff, that one of your diagnoses for the plaintiff is overt malingering, correct?

A. Correct.

Q. Does the information you gleaned from Dr. Hausknecht's report and the contrast between the two examinations inform your opinion?

MR. SACKS: Objection to the form, the leading. And I ask you to rephrase it.

MR. WALTHALL: I'll rephrase it.

Q. Doctor, you diagnosed the plaintiff as having overt malingering, correct?

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A. Yes.

Q. Does your review of her medical records and the exams and the reports of the exams contained therein inform your opinion that she was overtly malingering?

MR. SACKS: Objection to the form and the leading.

Q. Do you base part of your opinion that she was malingering on what you've gleaned from the reports?

MR. SACKS: Objection. Again, nothing's in the record about what he reviewed.

MR. WALTHALL: Other than Dr. Hausknecht's record.

MR. SACKS: But you asked records, plural.

A. Essentially, when I made that diagnosis it was on June 7th of 2011. When I read this report, which is, obviously, two days later, it reinforced my opinion that she is overtly malingering.

MR. SACKS: Move to strike.

Q. And what about it reinforces

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your opinion from June 7th of 2011?

A. Because when I examined her on June 7th of 2011, she had very little motion of her neck and lower back, and then she was examined two days later and had significantly more motion.

Q. Doctor, at the time that you examined Miss Springer, do you know whether or not she had received any epidural injections?

A. As far as I know, I do not believe she did.

Q. Doctor, throughout your examination you've been looking at some papers on your desk, correct?

A. Correct.

Q. And was one of those things a report that's been marked as Defendants' Exhibit A for identification today?

A. Yes.

Q. Okay.

MR. SACKS: May I see it, please?

MR. WALTHALL: Sure (handing).

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Q. And can you tell us what Defendants' Exhibit A is?

A. It's my report that was generated from my examination of this claimant on June 7, 2011.

Q. Does it also contain your impression of your review of the medical records of Miss Springer?

A. It has review of multiple medical records, yes.

Q. Is that something that you do in your normal course of business?

MR. SACKS: Objection.

Q. When you conduct an examination?

MR. SACKS: Objection.

A. Yes.

Q. And you examine someone for litigation, and you prepare a report in your normal course of business?

MR. SACKS: Objection.

A. Correct.

MR. WALTHALL: At this time I'd like to offer Defendants' Exhibit A

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into evidence.

MR. SACKS: Over my objection.
You could do whatever you'd like with it.

Q. Okay. Doctor, as we sit here today, do you have a specific recollection of examining Miss Springer?

A. No.

Q. But you were using your report to refresh your recollection?

MR. SACKS: Objection to the leading.

MR. WALTHALL: Withdrawn.

Q. Did you use your report to refresh your recollection?

A. Yes.

Q. Are you familiar with a neurologist by the name of Ashok Anant, A-N-A-N-T?

A. No.

Q. Have you ever met Dr. Anant?

A. No.

Q. Did you ever discuss Miss Springer with Dr. Anant?

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A. No.

Q. At any time, did you ever make a call to Dr. Anant, make a call to his office, communicate in any way, e-mail, text, fax with Dr. Anant about Miss Springer?

A. No.

Q. Doctor, I'm just going to ask you, with a reasonable degree of medical certainty, can you repeat the diagnosis that you offered earlier that you reached after examining Mrs. Springer and examining her medical records?

MR. SACKS: Objection, repetition, objection to the form.

You can answer.

A. Overt malingering, resolved cervical and lumbar spine, resolved strain to the right shoulder.

Q. Doctor, with a reasonable degree of medical certainty, as a result of the injuries she sustained in the motor vehicle accident that is the basis of this case, is it your opinion that Miss Springer needs surgery to any part of her body?

MR. SACKS: Note my objection to repetition.

A. No, she does not need surgery to her neck, back or right shoulder.

MR. WALTHALL: Thank you. I have nothing --

THE WITNESS: You're welcome.

MR. SACKS: May we go off the record.

THE VIDEOGRAPHER: Sure. Off the record at 1:25 p.m.

(Whereupon, an off-the-record discussion was held.)

(Whereupon, Dr. Varriale's report included in Rule 26 exchange was marked as Plaintiff's Exhibit 1 for identification as of this date by the Reporter.)

THE VIDEOGRAPHER: We're on the record at 1:33.

BY MR. WALTHALL:

Q. Dr. Varriale, as part of your examination of the plaintiff's medical

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records, did you review any MRI films?

A. Yes.

Q. And which films did you review or what parts of the body?

A. The MRI of the lumbar spine dated 6-8, 2010, an MRI of the cervical spine dated 7-17, 2010, and an MRI of the shoulder, I don't have the date in front of me.

Q. Did you use those MRI films, your review of those MRI films, to reach your --

MR. SACKS: Objection to leading.

Q. -- your ultimate opinion in this case?

MR. SACKS: Objection. Stated the basis of his opinion. You said you had one more question.

Object to the repetition.

Q. Was your review of the MRI films part of your review of the records that led to your ultimate opinion in this case?

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MR. SACKS: Objection to the leading.

A. Obviously, it's not as per my opinion of June 7, 2011, nor my opinion of July 21st of 2011, but as I sit here today, it does help me solidify my diagnosis, yes.

MR. WALTHALL: Okay. Thank you, Doctor.

MR. SACKS: Move to strike the answer as being beyond the Rule 26 exchange.

These are the little folders that these little guys came in (indicating)?

THE WITNESS: Yes. There are a couple things in there I didn't review, like -- it was an ultrasound of the belly and another one was something else that was not in my field.

MR. SACKS: We all set?

THE VIDEOGRAPHER: Yes.

EXAMINATION BY

MR. SACKS:

P.L. VARRIALE, M.D.

Q. Hi, Dr. Varriale. My name is Bradley Sacks.

A. Hello.

Q. I'm here today on behalf of the plaintiff in this lawsuit, and I want to go over a few things that you may have mentioned on your direct examination in the case.

A. Okay.

Q. First you indicated that you were looking at a folder in front of you, sort of like a baby blue with a bunch of papers in it.

A. Correct.

Q. Now, you indicated that the report that you prepared dated June 7, 2011 was prepared in the ordinary course of your business as a orthopedic surgeon; is that correct?

A. Correct.

Q. So as an orthopedic surgeon, part of your job is to examine litigants and render reports to third-party consulting companies; is that correct?

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A. Correct.

MR. WALTHALL: Note my objection.

Q. And as part of your board certification with the American Board of Orthopedic Surgery, did you have training in the preparation of medical reports for litigants in third-party actions?

A. Not in my orthopedic training as an orthopedic resident, no.

Q. And the company that you performed these reviews for, what's the name of the company?

A. There are several.

Q. What's the one that contacted you in this particular case?

A. I don't really know.

Q. UMC Medical Consultants?

A. Yes, that could be the one.

Q. About how often do you do medical evaluations for UMC Medical Consultants?

A. About three cases a week.

Q. And that's just for UMC

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Consultants?

A. Correct.

Q. Since we're talking about things that you do per week, you are in the active practice of orthopedics?

A. Correct.

Q. What days a week do you have office hours?

A. Mondays, Wednesdays and Thursdays.

Q. And on the Mondays, Wednesdays and Thursdays, do you also conduct evaluations of litigants?

A. Yes.

Q. Are those done on Mondays, Wednesdays and Thursdays?

A. Correct.

Q. And Tuesday, so that would leave Tuesday and Friday, do you do surgery on those days?

A. On Friday, sometimes on Tuesday.

Q. I'm sorry, when did you examine Miss Springer?

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A. I believe it was on June 7th, and every once in a while on a Tuesday I'll go into New York City and do independent medical examinations.

Q. I'll just move to strike your answer. Try to follow along, and we'll get to the same place, okay.

I just want to know, June 7th is the day you performed your examination, correct?

A. Correct.

Q. And back on June 7th of 2011, you had offices for the practice of orthopedic surgery here where we are today on Franklin Avenue, correct?

A. Correct.

Q. And you had offices for the practice of orthopedics someplace else as well, correct?

A. Correct.

Q. And that was somewhere in Rockville Centre?

A. Yes.

Q. And you're part of a group

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called Orthopedic --

A. Excellence.

Q. -- Excellence of Long Island, correct?

A. Correct.

Q. And that's through your affiliation with the physicians who work at Mercy Hospital, correct?

A. Not really sure what you mean by that.

Q. Well, you're on the staff of Mercy Hospital, correct?

A. Correct.

Q. You're part of the sports medicine unit of the department of orthopedics, correct?

A. Yes.

Q. And the physicians who form the core of Orthopedic Excellence of Long Island are all with you or practice with you at Mercy Hospital, correct?

A. That's one of the hospitals, yes.

Q. In the offices in Rockville

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Centre and the offices here in Franklin Avenue, you have equipment to perform actual treatment of patients, correct?

A. Yes.

Q. And if you want to measure the range of motion that a patient might exhibit, you have instruments here in Franklin Avenue that you could use, correct?

A. If I wanted to.

Q. And would there be something called a goniometer or inclinometer?

A. Correct.

Q. And on June 7th of 2011, when you examined Miss Springer, you were at 19, was it West 34th Street?

A. Correct.

Q. Now, 19 West 34th Street is a commercial building, correct?

A. Correct.

Q. And there's a clothing store, is it Banana Republic --

A. Next door, correct.

Q. -- you enter next door? And

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that's a building where you just use a particular office when you're going to see patients involved in lawsuits, correct?

MR. WALTHALL: Note my objection.

A. They're not all involved in lawsuits, no.

Q. So you actually have as one of your office locations where you see and treat patients as 19 West 34th Street; is that correct?

A. No, I don't treat patients there.

Q. So the offices of 19 West 34th Street have nothing to do with Orthopedic Excellence of Long Island, correct?

A. Correct.

Q. And in fact, you just borrow a doctor's office to conduct an examination, correct?

A. Correct.

Q. Do you know whether that doctor was a psychologist or a dentist or do you know what kind of specialty office it is in

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suite 1200 in that building?

A. I believe it's mainly a psychologist's office, but there are several other specialties also working there, like a chiropractor and a neurologist.

Q. Now, do you know whose office you borrowed, did you borrow the psychologist's office or the chiropractor's office or the neurologist's office to do the examination?

A. It's an office that has multiple offices in it, and there is no particular specialty that works in any particular office as far as I know.

Q. Okay. Now, you've testified a number of times over the years in lawsuits, correct?

A. Correct.

Q. And every now and again you're called upon to testify in cases involving patients of your own who've been injured either in an accident or due to illness and, if necessary, you'll go to court and

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testify on their behalf, correct?

A. Yes.

Q. As far as testifying in cases involving people that you examine solely for the purposes of a lawsuit, would it be fair to say that at least 90 percent of the time you testify for a defendant?

A. Correct.

Q. And how much did you charge for your initial examination of Miss Springer, preparation of the report of June 7th and review of the records that you had available to you that you wrote about in that report?

A. I'm not exactly sure. It could be about $400.

Q. So, and we're here today in your offices, so if you wanted to, is there a record that you could consult or is it can you tell me why you wouldn't be able to figure that out while we're here?

A. Well, it's not here in the chart, and I don't really know how much I got paid for it.

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Q. Well, where would a record be kept of how much you got paid for it be?

MR. WALTHALL: Just note my objection.

A. I'm not sure where they kept it. Probably with my secretary who works with me during these examinations.

Q. And is she located in the Franklin Avenue office, the Rockville Centre office or do you park her at the 19 West 34th Street location?

A. No, she works -- when I do my independent medical examinations, she's with me.

Q. Now, you used the word "independent," and I'd just like to move to strike that. Whether you're independent or not would be a question of fact for someone else other than us.

MR. WALTHALL: Objection to any movement to strike any portion of the testimony.

Q. I've asked that we mark as Exhibit 1 for today's examination a report dated June 7th of 2011. Would you take a look at it.

A. Okay.

Q. Turn the pages, see if you recognize it.

A. Okay.

Q. Is that your signature?

A. Yes.

Q. And when you prepared this report, you knew it was in connection with a lawsuit, correct?

A. I'm not sure if I knew that at that time, maybe I did.

Q. Well, you addressed it to the law office of Hoey, King, Toker & Epstein, so did you think they were a group of practicing physicians?

A. No.

MR. WALTHALL: Objection.

Q. Did you get hired by UMC Medical Consultants to perform the evaluation?

A. Correct.

Q. And UMC Medical Consultants

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primarily does evaluations of litigants in lawsuits, correct?

A. Usually.

Q. So you had an idea that it involved a lawsuit?

A. Yeah, I had a good inkling that it could be.

Q. And did you know that the firm of Hoey, King, Toker & Epstein said that they paid you $715 for your IME report, does that refresh your recollection as to how much you were paid in connection with your examination of Miss Springer, review of the records they made available to you in preparation of the report?

A. No.

Q. Now, is it fair to say that you get paid $10,500 for your testimony to appear in court?

A. Yes.

MR. WALTHALL: Objection.

Q. Are you being paid $10,500 for your appearance here today?

A. I believe so.

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Q. Did you utilize any instruments at all during, other the reflex hammer that we made some discussion of earlier, during your examination of Miss Springer?

A. No.

Q. Did you ask Miss Springer to disrobe?

A. I don't recall.

Q. Well, did you have a usual practice when doing litigation-based examinations at 19 West 34th Street to have the patients disrobe?

A. It's not usual and customary. If I need for the patient to disrobe, I make her disrobe.

Q. And you have no note one way or the other whether you did or not, correct?

A. Correct.

Q. Do you know how she was dressed that day, what type of shirt she was wearing, what kind of pants she was wearing?

A. No.

Q. Did you do your feeling for

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points of tenderness through whatever shirt she was wearing that day?

A. That's not usually my practice.

Q. So did you reach your hand inside her shirt in order to perform an evaluation for tenderness or did you limit your evaluation to certain specific areas of her body that wouldn't be covered by clothing?

MR. WALTHALL: Note my objection. That's a compound question. You want to break it up.

MR. SACKS: Sure.

Q. Did you limit your examination for tenderness to parts of Miss Springer's body that were not covered by clothing?

A. No.

Q. So then you would have asked her to remove her shirt?

A. Not necessarily --

MR. WALTHALL: Objection, asked and answered.

A. -- but --

Q. When you examined for

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tenderness, did you examine her entire back?

A. I'm not sure what you mean by that.

Q. Well --

A. Touched every portion of her back you mean?

Q. Well, her back would run from the, we'll call her neck the cervical spine, okay, so the rest of her back would be the, all the vertebrae from after the cervical vertebrae down to her sacral vertebrae, right?

A. Correct.

MR. WALTHALL: Note my objection. I don't know whether he's offering testimony or offering an opinion. Just note my objection.

MR. SACKS: Whether I'm offering an opinion or testimony?

MR. WALTHALL: Yes. You were just reciting to him, this is the part of the back, instead of just asking him, what part of the back did

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you touch.

MR. SACKS: This is cross-examination.

MR. WALTHALL: I understand that.

Q. Now, coming back to your work involved with litigation, so you have office hours those three days a week that you discussed, and sometimes on Tuesdays, and you would also do some in New York, correct?

A. Correct.

Q. I should say in New York, in Manhattan?

A. Correct.

Q. Now, approximately how much patients per Monday, Wednesday and Thursday office session would you see that were involved in litigation that you were examining just for the purposes of a, what you call a medical examination?

A. I'm sorry, you said litigation, and then you said medical examination. Which one do you mean?

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Q. I'm trying to use your words.

Did you perform a medical examination on Miss Springer?

A. It's called a medical examination, yes.

Q. And you did it for the purposes of litigation, correct?

MR. WALTHALL: Just note my objection. Asked and answered.

A. Like I said, at that time, I wasn't a hundred percent sure if this was litigation, but most likely was.

Q. All right. Well, let's follow up on that for a second.

The report that was exchanged in the Rule 26 information that was provided by Hoey, King, I forget all the names --

MR. WALTHALL: Just say Hoey, King.

Q. -- Hoey, King, Epstein, Prezioso & Marquez indicated that you made this report based upon the section 13-a of the Workers' Compensation Law. Do you also

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do examinations for Workers' Compensation Law?

A. I'm not sure what you mean by that.

Q. Well, I'm going to show you what's on page three of your report dated June 7th that you indicated you agreed with your signature, and do you see the paragraph under impression and diagnosis, where you talk about how you did this examination consistent with the Workers' Compensation Law section 13-a?

A. Not really sure what that means.

Q. So you have a practice of putting into your reports information that you're not even sure what it means; is that correct?

A. Well, that particular line, I don't know what that means.

Q. Well, when you say not just that particular line, that indicates that you've done a certain type of examination, and earlier, you just indicated you weren't

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sure if this was for litigation or not, so it's possible, then, on that day you thought you were doing a Workers' Comp exam?

A. Possible.

Q. Okay. And then can I see the report you marked as Exhibit A?

A. (Handing).

Q. Now, there are two reports that are both dated June 7, 2011, can you agree with that, one that's marked Exhibit A and one that's marked Exhibit 1, correct?

A. Correct.

Q. Do you always make two different reports for an evaluation on the same day?

A. No.

Q. And in this particular case, since you were retained by or retained through UMC Medical Consultants, would it be fair to say that the report was prepared by the UMC Medical Consultant transcription department or was it done here in your own offices?

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A. It was done by a typist that I used.

Q. And is that typist, do you use one or more than one typist for this purpose?

A. Let me just, I'm sorry, let me go back to that last question.

Sometimes it's my typist and sometimes it's their typist.

Q. Now, do you know whether in this particular case the reports were actually prepared at the UMC Medical Consultant facilities or not, do you know?

A. No.

Q. Is there any way to figure that out?

A. Sometimes in the, on the bottom of the report it said who typed it.

Q. Well, this one has PLV, which is --

MR. WALTHALL: Where are you referring to?

MR. SACKS: The bottom of the report marked Exhibit 1 I'll start.

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Q. This one says PLV, which would be referring to you?

A. Right.

Q. And then slash DN --

A. That's my typist.

Q. -- and then slash JH.

Who's JH?

A. My other typist.

Q. Okay. So one of your two typists prepared the report of June 7, 2011 that we marked Exhibit 1?

A. Correct.

Q. And the report that's dated June 7, 2011 that we marked as Exhibit A was also then prepared by DN, JH and JH?

A. Yes.

Q. Now, and as you sit here today, you don't have a recollection of dictating two separate reports on that day, correct?

A. Correct.

Q. Would it be also fair to say that this report dated June 7, 2011, that we've marked Exhibit A, contains reference to many more records as records reviewed

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than the report that's marked as Exhibit 1 of today's date that's also dated June 7th; is that fair?

A. Yes.

Q. Now, can you tell me, please, when you reviewed the records that are indicated in your report of June 7th that's marked as Exhibit 1 for today's date, do you know when you got those records?

A. I believe they were before or around -- before I dictated the report.

Q. Well, did you dictate the report on the same day or some other day than the date of the date on the report?

A. Sometimes it's that day, sometimes it's the next day.

Q. I understand that, but I'm asking about in this case, can you tell me?

A. I don't remember.

Q. And again, is there anything in your folder here or that you have someplace else that you could use to refresh your recollection?

A. There's nothing in my records.

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Q. Now, based upon a review of Exhibit 1 for today's date, we'll call it a report dated June 7th, this does not indicate that you reviewed any films at all, correct?

A. Correct.

Q. Now, in fact, would it be fair to say that whatever opinion is expressed in this report dated exhibit -- I'm sorry, dated June 7th, marked as Exhibit 1, wouldn't rely upon any records or films or information other than what's set forth in the review of medical records indicated in the report, correct?

A. Correct.

Q. So then would it be fair to say that when you dictated this report dated June 7, 2011, that we've marked as Exhibit 1, which was exchanged as your Rule 26 information -- let me ask you this: Do you know what Rule 26 information means in a federal case?

A. No.

Q. Did you testify in a federal

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case, Eastern District of New York, about two years ago?

A. I don't remember.

Q. Did you help prepare a list of cases that you testified in over the last four years?

A. My secretary did, yes.

Q. Did you review it?

A. No.

Q. Did you try to do anything to ascertain whether it was an accurate list of the cases that you actually testified in over the last four years?

A. She had all the records, and I -- I told her to get the information that was required for the case, and she got the information. I would not remember which cases I testified on.

Q. So if a case is left out that you actually testified in, that would be her fault then?

A. I -- wouldn't necessarily be her fault, she just didn't have record that I testified on that.

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Q. Well, you understand that in a federal case where this type of information has to be exchanged, basically, you're warranting that the information going out under your name is accurate; you understand that, right?

MR. WALTHALL: Just note my objection. You're making a statement, and then asking him -- then asking a question. It's pretty much one or the other, you can't just make the statement. You can ask him if he knows about Rule 26, what it means, what he's done, but you're making a statement of fact, and that's just improper.

Q. When were you asked for this list of cases?

A. I believe about a week ago.

Q. And were you told that you had to prepare and provide that list within 24 hours?

A. I don't recall the time frame.

Q. It was a short time frame,

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though, wasn't it?

A. Yes.

Q. And did you know that back in December of 2011, the attorneys who were working with you on this case indicated that they were going to obtain a list of your cases back at that time from you?

A. I don't remember.

Q. Did you review records before you examined Miss Springer on June 7th, after you examined or while you were examining her?

MR. WALTHALL: Just note my objection, asked and answered.

Q. And I'm asking about the records you reviewed in the document we've marked Exhibit 1, which was exchanged as your Rule 26 information.

MR. WALTHALL: Just asking specifically about those records or any records he reviewed?

MR. SACKS: See, under Rule -- I'm asking him about the Rule 26 expert exchange in this case, which is a report dated June 7th.

Q. Did you review the records indicated in here before, during, after, or something else relative to the examination of Miss Springer on June 7th?

MR. WALTHALL: Objection, asked and answered.

But you can answer.

A. I don't remember that.

Q. So do you have any idea when these x-rays that you indicated at some point you reviewed, did you ever prepare a report in which you discussed your opinions about what was in any of the MRI studies or imaging studies that you indicated at some point in time you reviewed?

A. No.

Q. So you have never reduced to writing any report that contains the substance of the facts or opinions with respect to the review of specific imaging studies, correct?

A. Correct.

MR. WALTHALL: Just note my

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objection.

Q. Did you ever issue a report that contained the substance of your opinions with respect to any records that are not referred to in what we've marked as Exhibit 1?

A. Yes.

Q. And when did you do that?

A. July 21, 2011.

Q. And can you just give us some idea how that July 21, 2011 report came about?

A. Most likely what happened is that they sent further medical records on this case, asked me to look at the records, and asked me if it changed my opinion, and I gave the -- I looked at the records and wrote -- and made the report.

Q. So basically, would it be fair to say that having reviewed all those records nothing changed your opinion, correct?

A. Correct.

Q. So anything that was in those

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subsequent records was not relevant to formulating any of the opinions that are set forth in Exhibit 1 dated June 7th, correct?

MR. WALTHALL: Objection. It's asking him to make a call on what's relevant and what's not.

MR. SACKS: No, no. I think he can determine what's relevant to his own determinations, and I'm asking him --

Q. So none of them formed the facts or the substance in the opinions set forth in Exhibit 1, correct?

A. Correct.

Q. Do you know a doctor named Sebastian Lattuga?

A. Yes.

Q. And he's a board certified orthopedic surgeon?

A. I'm not sure if he's board certified.

Q. He practices here in Nassau County?

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A. Correct.

Q. And he's on the staff of other hospitals that have departments of orthopedics, correct?

MR. WALTHALL: Just note my objection.

A. Yes.

Q. And you see him from time to time at the Nassau County Orthopedics Society?

A. I haven't seen him for many years.

Q. Do you know he has a good reputation as an orthopedist?

MR. WALTHALL: Objection.

A. No comment.

MR. WALTHALL: Objection.

Q. If he went to medical school, did a residency and got board certified, then he has the same credentials as you, correct?

MR. WALTHALL: Objection.

A. I'm not sure what you mean by that.

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Q. I'm trying to determine -- you were asked questions earlier on about your background and training, and you indicated you went to medical school, that you did a residency, and that you passed a board certification exam.

A. Correct.

Q. So if another doctor goes to medical school, a residency at a good accredited institution and passes the oral and written examination by the American Board of Orthopedic Surgeons, they have the same credential as you do in terms of their background and training?

A. Right, if they've done all that, they have the same credentials as a board certified orthopedic surgeon.

Q. And when you formulated your opinions on June 7th, you have not yet reviewed, or had not yet reviewed, any reports of Dr. Lattuga, correct?

A. If that's what it says there, and I have -- and I did not.

Q. Now, do you recognize

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acupuncture as a form of therapy?

MR. WALTHALL: Just objection. Does he recognize it?

MR. SACKS: Yes, I'm asking whether he recognizes, that was exactly my question.

A. Is it a form of therapy?

Q. Do you recognize it as a form of therapy?

A. I recognize that it exists as a therapy, yes.

Q. And have you had any training in it?

A. No.

Q. And do you know whether or not in this particular case Miss Springer was treated by acupuncture specialists who were, in fact, also M.D.s?

A. If the record states that, if they're in the record, then she was.

Q. Okay. Is there any other records that you reviewed in connection with your report of June 7th that would have included the therapy she received from

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acupuncture specialists?

A. This says physical therapy notes from Allstate Physical Therapy.

Q. So is physical therapy and acupuncture the same to you?

A. No.

THE VIDEOGRAPHER: Can we change tapes?

MR. SACKS: Sure.

THE VIDEOGRAPHER: Off the record at 2:03 p.m.

(Whereupon, an off-the-record discussion was held.)

THE VIDEOGRAPHER: This is tape two. We're on the record at 2:08.

BY MR. SACKS:

Q. Now, I think you indicated that you agreed that Miss Springer suffered, I think you used the word "strain" of the cervical spine, lumbar spine and the right shoulder, correct?

A. Yes.

Q. And you indicated you reviewed some reports taken of her lumbosacral and

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cervical spine on May 20, 2010 in your report dated June 7th that was marked as Exhibit 1.

A. Okay.

Q. Now, those were taken at the emergency department of Syosset Hospital, correct?

A. Yes.

Q. So at that time, in your opinion, they were correct in diagnosing that she suffered a cervical sprain, lumbar sprain and some injury to her shoulder?

A. I'm not sure what they diagnosed.

Q. So you didn't review any records from the initial emergency room visit either?

A. I have a page, but you could hardly read it.

Q. So just by way of, since you, if I'm not mistaken, you work about 45 weeks a year doing examinations?

MR. WALTHALL: Just note my objection, but --

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A. Okay, thereabout.

Q. And you see patients including litigation examinations three days a week?

A. Yes.

Q. And you do about five examinations a day for litigation of those three days?

A. Okay, yes.

Q. So it's -- that's about 15 a week times 45, I'm not so good with math, but you do quite a few of those per year, then?

A. Yes.

Q. Somewhere around a hundred a year at least, correct?

A. For litigation.

Q. Just talking about litigation.

A. Yeah.

Q. So you know that if you need to see records, all you have to do is ask to get a better copy, correct?

A. If I needed it, yes.

Q. So the fact that someone furnished you with what you considered to

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be an illegible copy of the Syosset emergency room record isn't really what prevented you from looking at it, is it?

MR. WALTHALL: Objection.

A. If I wanted a complete report of the emergency room visit, and I needed it, I would have inquired to how to get it.

Q. Right. And then did you know that she was treated -- you know that she was treated by a doctor by the name of Goldenberg?

A. I'm not sure. I'd have to go through my records to look at that.

Q. Well, here, take a look at your report dated June 7th that we marked as Exhibit 1. Do you have any records of Central Park Physical Medicine or Dr. Goldenberg that you reviewed?

A. Not there, no.

MR. WALTHALL: Referring to Exhibit 1.

MR. SACKS: Yes, I'm only referring to Exhibit 1.

MR. WALTHALL: He said "not

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there," I wanted to clarify for the record.

MR. SACKS: I understand.

MR. WALTHALL: You're agreeing with me.

MR. SACKS: I'm agreeing with you.

Q. Now, do you recognize the medical specialty of physical medicine and rehabilitation?

MR. WALTHALL: Just note my objection to what he recognizes, but --

A. Do I recognize it?

Q. Yes.

A. I know what it is.

Q. And would you agree those are specialists in trying to assist patients overcome injuries, correct?

A. Yes.

Q. Do you know if she consulted one after the accident?

A. I believe she did, but I'd have to go through my records to confirm that.

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Q. Well, can you just look at Exhibit 1 and tell me which one of those is the physical medicine and rehab specialists?

A. You asked me if she ever did, and I said I don't know. According to my records, I did not review any records that pertained to physical medicine and rehabilitation.

Q. Did you review any records from a Dr. Yali Li?

A. Did I ever review records on a Dr. Li --

Q. Let me withdraw that.

A. -- is that the question?

Q. In connection with preparation of your report dated June 7, 2011 that we've marked as Exhibit 1, did you review the records of a Dr. Li?

A. No.

Q. Do you know what type of specialist Dr. Li practices?

A. Sitting here, no.

Q. Are you familiar with

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electrodiagnostic medicine?

A. Yes.

MR. WALTHALL: Objection. That the name of the place or type of medicine?

Q. Is that a form of neurological specialty?

A. It's actually a part of an evaluation that either a neurologist or a physiatrist would do in evaluating the, the nerve status of nerves in the neck -- from the, in the upper and lower extremity.

Q. Are you familiar with a physician by the name of John Stamatos?

A. I've heard of his name, but I'm not really sure what he does.

Q. In connection with the preparation of your report dated June 7th that we've marked as Exhibit 1, would it be fair to say that you didn't review the records of Dr. Stamatos?

A. Correct.

Q. And in terms of your opinion, do you have an opinion one way or the other

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as to whether or not Miss Springer was still recuperating from the effects of the car accident in December 2010, which would be about four and a half, five months after the accident? I'm sorry, six and a half, seven months after.

MR. WALTHALL: So you're asking him, just to clarify the question, you're asking him when she saw Dr. Stamatos?

MR. SACKS: I was using a point in time, December 2010.

MR. WALTHALL: Whether she was still recuperating from the accident in May?

MR. SACKS: Yes.

MR. WALTHALL: His opinion.

A. You're asking me in my opinion?

Q. No. I'm asking based upon your review of the records, you indicated she had a sprain to her -- or was it a strain?

A. Strain.

Q. Strain. Find that. Just a minute.

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She had a strain to her cervical spine, lumber spine and her shoulder. Did you have records to review that you looked at from December 2010 that would have assisted you in determining whether or not she was still recuperating at that point from those strains?

A. I did not look at any records at that time.

Q. And do you know whether or not Dr. Stamatos had made arrangements or had recommended to the patient to have an epidural?

A. You mean as per my record, evidence 1?

Q. Do you know of any physician who recommended that she undergo an epidural prior to the time you examined her on June 7th of 2011?

A. Not that I know of.

Q. Would that be significant one way or the other in your evaluation of this patient?

A. No.

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Q. This person?

A. No.

Q. Now, a strain has to do with the stretching or the tearing of muscles or tendons, correct?

A. Yes.

Q. So you agree, would you agree if you believed she had a strain of muscles and tendons as a result of the impact in this accident that it would not be unreasonable for a patient to seek treatment for those kind of injuries, correct?

A. Correct.

Q. And I think you indicated you did review physical therapy reports from Allstate Physical Therapy, correct?

A. Correct.

Q. So at least those records indicated that between June and August of 2010, she was seeking some form of relief from whatever was bothering her, correct?

A. Yes.

Q. The records that you had

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initially reviewed included reports of imaging studies that showed that she may have had a tear in one of the structures of her right shoulder, correct?

A. Can I see that report again?

Q. (Handing.)

A. Can you ask the question again, please?

Q. Do you know whether or not one of the imaging studies that were done either in -- that were done in June of 2010 or July of 2010 indicated that she had a tear in her right shoulder, in one of the structures of her right shoulder?

A. Yes.

Q. And can a tear of the right shoulder or structure in the right shoulder cause the patient to suffer some limitation of motion?

A. Yes.

Q. Now, you indicated that you examined the various ranges of motion of her shoulder, and you felt that she wasn't trying her best to show you her true range

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of motion, correct?

A. Correct.

Q. But she showed it to other physicians whose records you reviewed, correct?

A. Reviewed when?

Q. At any time. I'm not referring to specific records, I'm just saying you looked at records where you indicated that you found she had demonstrated better range of motion?

A. For her shoulder, I'd have to go back and look at my records.

Q. So you're not sure?

A. Right.

Q. And as far as her neck and her back are concerned, you've determined in your mind that she is a overt, meaning -- what does overt mean?

A. Obvious.

Q. -- an obvious malingerer. And in that case, do you have an opinion why she would be malingering?

A. She -- I think she's

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malingering -- she could be malingering for several reasons.

Q. So you don't have an opinion one way or the other as to why?

A. I have opinions, but I don't know -- it's probably a multitude of opinions.

Q. Now, did you review any records having to do with some medical procedures she needed in January 2011?

A. Yes.

Q. Did you review the findings on physical examination that the physicians made when they admitted her to North Shore University Hospital for that procedure?

MR. WALTHALL: Just note my objection, foundation.

A. As of my -- as per that report marked Exhibit 1?

Q. Yes.

A. No.

Q. In formulating your opinions of June 7, 2011 that's marked as Exhibit 1, then you didn't utilize any history from

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any examinations of physicians at North Shore University Hospital that were done in January of 2011, correct?

A. Correct.

Q. Now, do you know, did you ever review any records in preparation of your report of June 7th from a physician by the name of Dr. Kahn?

A. I don't believe so, no.

Q. And did you review any records in preparation of your report of June 7, 2011 from a Dr. Katzman?

MR. WALTHALL: We're talking specifically, because both reports are dated June 7th, specifically referring to Exhibit 1, correct?

MR. SACKS: In a lawsuit, there's only supposed to be one reported dated June 7th that's involved in the case, so I'm trying to stick to the one that's attached to what was served in the case, so when you say the two reports, I don't know what you're referring to, other

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than something's been marked Exhibit

A. It could have been prepared any time, it just has a date of June 7th.

MR. WALTHALL: As long as we understand there are two reports.

MR. SACKS: We don't understand. The doctor hasn't explained it at all. I think it's up to him to explain it.

MR. WALTHALL: We know there are two reports dated June 7th, correct?

Q. As I said, did you review any records from a Dr. Katzman in formulating your opinions in your report dated June 7th of 2011 that's marked Exhibit 1?

A. No.

Q. Do you know if Dr. Katzman's also an orthopedic surgeon?

A. Yes.

Q. And he too is someone who attended medical school, did a residency and is board certified in orthopedic surgery as well, correct?

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A. I'm not sure if he's board certified.

Q. Do you prepare any written notes when you perform your examination at the 19 West 34th Street location of a patient involved in litigation, just as a practice, do you normally --

A. First of all, it's not my patient; secondly, yes.

Q. And do you have those written notes here?

A. No.

Q. Do you send those written notes to anyone?

A. No.

Q. Are they notes that are added to some preprinted form?

A. Yes.

Q. Do you have a copy of the form that you use?

A. I can get you one.

Q. Is it something you can get here in the office?

A. Yeah.

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Q. Then we'll, when we take a break --

A. Okay.

Q. -- we can get that to complete the record, okay?

A. Okay.

Q. And in there there would be different areas of the body where you could record different findings or measurements based on your examination, is that why it's a preprinted form?

A. It's a preprinted form.

Q. Why do you use a preprinted form?

A. Because there are certain items there that I could fill in, makes it easier for me to do the history, take the history, do the physical examination.

Q. When you dictated the report of June 7th, your recollection was that the patient told you that she had no feeling in all four limbs, correct?

MR. WALTHALL: Objection.

A. She told me that she had -- she

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had numbness in all four extremities.

Q. So did you understand that to mean in every part of all four extremities had no feeling?

A. I didn't necessarily think that at that time.

Q. Do you think that now?

A. That she had numbness in all four extremities, no.

Q. But that's what she told you.

A. That's what she told me.

Q. Did she say to you, I have decreased feeling in all of them or did she use some other words?

A. I wrote the word "numb." So that's probably what she said.

Q. Do you think she was exaggerating?

A. At that time, numbness in all four extremities could be real.

Q. And then when you examined her, you did find there was some diminished sensation in one leg, correct?

A. Not some, the whole limb was

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decreased sensation.

Q. Well, you tested each region, correct?

A. Yes.

Q. And each region she said there was some decreased sensation, correct?

A. Correct.

Q. And you didn't quantify how much diminishment in each region, correct?

A. Correct.

Q. And in terms of the range of motion of her neck, you indicated that she refused to move her head past certain points when you were doing the range of motion examination of her neck, correct?

A. Well, refused, I'm not sure if that's the word. I mean that's all she would move.

Q. But what did she say happened when she moved, did she say, It hurts, did she say, I can't make it go any further, what did she say was limiting her ability?

MR. WALTHALL: Objection. If anything.

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A. I'm not sure what commentary went on at that time.

Q. So at no time during the course of your examination did she say to you that when I move my neck a certain way it hurts?

A. I don't recall.

Q. So she may have mentioned to you that she experienced pain from time to time?

MR. WALTHALL: Objection.

A. Well, in the history she said that she had pain in her neck and lower back.

Q. And when you examined her, you said she never said to you she felt pain as you were moving her through the range of motion; is that your testimony?

A. No.

Q. That was a bad question.

So you're saying she never told you, during your examination that, at any point during the exam of her neck, she felt pain?

A. I don't remember.

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MR. WALTHALL: That was equally bad question, objection.

Q. And how about when you examined her low back, do you recall one way or the other whether or not she complained of pain at some point during the flexion, extension or rotation examinations of her low back?

A. I don't remember.

Q. And do you recall if she told you whether or not she experienced pain during the abduction or adduction portion of the shoulder examination?

MR. WALTHALL: Objection.

A. Again, I don't remember.

Q. Did you formulate an opinion as of June 7, 2011 when the signs or symptoms of her cervical strain resolved?

A. It was very difficult to me to determine exact date.

Q. And would it be the same answer for the lumbar spine and the shoulder?

A. Correct.

Q. You did not give Miss Springer any type of neuropsychological evaluation,

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correct?

A. None other than a normal doctor would do in examining a patient, very superficial.

Q. And did she tell you on June of 2011, June 7th, whether she was taking any medications?

A. Yes, she was. Well, she didn't tell me anything. I had to glean whatever I had from the report.

Q. What medications were prescribed for her that she was taking as of June 7, 2011?

A. According to the reports, I gleaned that she was taking Valium and Vicodin at some point.

MR. WALTHALL: You should note, the record should reflect the witness is referring to Exhibit A.

Q. Actually, in Exhibit number 1 you say the same thing, don't you --

A. Yes.

Q. -- you say at some point in time?

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A. Correct.

Q. But did you review any records before making that statement to see what she was actually taking as of that time, June 7, 2011?

MR. WALTHALL: Just note my objection. At what point are you talking about?

MR. SACKS: As of June 7, 2011.

MR. WALTHALL: The day of the exam?

MR. SACKS: Yes, the day of the exam.

A. I reviewed the records, and that was all I could glean from the records.

Q. But you didn't review the records of Dr. Kahn, Dr. Stamatos, Dr. Li, or any other records from 2011 before your exam of June 7, 2011, correct?

A. Correct.

Q. So when you issued your report and your opinions, you didn't know one way or the other whether, in fact, as of that

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date she was still taking either pain medication or muscle relaxant medication or antianxiety medication that had been prescribed by treating doctors, correct?

A. I wasn't sure because she wouldn't answer any questions in reference to that.

Q. Well, you indicated in your report that there was no physician-patient relationship between you, and you were there to conduct an examination of her, correct?

A. Correct.

Q. And you were free to review whatever records were made available to you before issuing your report, correct?

A. Correct.

Q. And then you issued your report dated June 7, 2011 that we marked as Exhibit 1, and it listed the records you found significant to rendering that opinion, correct?

A. Correct.

Q. And if there were other records

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that you hadn't seen at least as of that date, you wouldn't have known whether they were relevant or they weren't, correct?

A. Correct.

Q. When you decide the amount you're going to ask for compensation for writing a report and doing an exam, is it based upon the time you spent with the patient?

A. No.

Q. When you determine the amount you're going to ask to be compensated for your time giving testimony, is it based upon the amount of time involved?

A. Yes.

Q. Now, in terms of today, we've been together whatever time we started up till now. Did you spend any time speaking with the attorney who represents the defendants in this case to prepare for this?

A. Over the phone, yes, we spoke.

Q. And about how long and how often did you speak over the phone with the

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attorney regarding issues in this case?

A. I spoke once about an hour or so, I don't really recall exactly the amount of time.

Q. Was that within the last month or so or --

A. I believe so.

Q. Now, prior to that, I think you indicated you've never spoken to the attorney or anyone from his firm about this case; is that correct?

A. Anyone from who?

Q. His firm.

A. Not that I know of.

Q. So there was the hour or so you spent preparing. Is that included in the $10,500 charge that will be assessed for your time today?

MR. WALTHALL: Note my objection.

A. I'm not sure.

Q. Who will make that determination?

A. I'm not sure what you mean.

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Q. Well, one of the other things in federal practice that the Rule 26 information is supposed to contain is the compensation the expert shall receive for their time in court, the amount that they charge for a report or evaluation of the patient, and whatever other sums they may be entitled to based on the time they've put in. It's just part of the disclosure. So that's why I asked whether there will be additional fees for the time spent in preparing for this or time spent reviewing records in addition to the $715 that was indicated as having been charged for the report of June 7th, plus the 10,500 that will be charged for your time today.

MR. WALTHALL: Objection. I don't think there's a question.

A. As far as I know and remember, yes, the answer is yes, that's what the fee is.

Q. And will there be additional -- I'm sorry, you've indicated you spent about an hour or so. Will the attorney or the representatives be billed for that time?

A. I don't remember if we billed them or not.

Q. Do you have an hourly rate that you bill out at?

A. Not necessarily.

Q. How do you decide how much to seek as compensation for time spent, as you did with the attorney here, going over the issues of the case for an hour or whatever amount of time?

A. It depends on how much records I have to review to speak to him and how much time it takes.

Q. And so here you said you spent about an hour or so. Is that plus time you spent reviewing records?

A. No.

Q. So for that time --

A. I'm sorry, I reviewed records during the conversation, but I don't recall -- I probably reviewed records prior to talking to him also.

Q. So who's going to decide how

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much the billing will be for that time?

A. I would.

Q. And how do you go about making the determination? I asked you if it was an hourly, and you said not.

A. I would say it's about $1,000 an hour or so.

MR. SACKS: Thanks. I have no other questions for you.

THE WITNESS: You're welcome.

MR. WALTHALL: I have a couple.

THE WITNESS: Yep.

EXAMINATION BY

MR. WALTHALL:

Q. Doctor, you mentioned that -- on cross-examination you were asked if you charged $10,000 for your testimony. You charge for the time away from your office or the time that you've had to clear your schedule, correct?

A. Correct.

MR. SACKS: Note my objection to the form.

Q. Did you, in fact, review the

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plaintiff's MRI films?

A. Yes.

Q. And that supported your prior diagnosis for the plaintiff, correct?

MR. SACKS: Note my objection to the leading.

A. Yes, it did.

Q. You testified on cross-examination about the fact that it wasn't relevant that Miss Springer was referred for an epidural. Why wasn't it relevant to you?

A. Because what's relevant to me is a patient that's sitting in front of me, and I talk to her, and I examine her, and I make a determination at that time, you know, what treatment is required, and what my diagnoses are. Whether she was referred to an epidural, you know, two or three months ago is not important to me.

Q. And you also testified with respect to the fact that the plaintiff's MRI showed that she had a tear in her shoulder; is that correct?

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A. Yes.

Q. Okay. Do you believe that a tear in her shoulder caused her problems?

A. I don't believe so, no.

Q. Why not?

A. It is very hard to say. I mean she had a, what's called a glenoid tear, glenoid labral tear, and sometimes it causes pain and sometimes it doesn't, but because she had so much malingering and restrictions and not allowing me to examine her shoulder, it's hard to say.

Q. You also testified that she had numbness in all four extremities, that she complained of numbness in all four extremities.

A. Correct.

Q. Was that numbness consistent with what you found on the exam of Miss Springer?

A. No.

MR. WALTHALL: Thank you.

EXAMINATION BY

MR. SACKS:

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Q. You rendered no written opinions about what you saw or didn't see in imaging studies in your report dated June 7th, correct?

A. Correct.

MR. WALTHALL: Objection, asked and answered.

Q. And you say that you think that she was indicating so much malingering. That's your opinion, correct?

A. Correct.

Q. Then it will also be your opinion that every doctor who disagrees with you is wrong, correct?

MR. WALTHALL: Objection. Objection, beyond the scope.

A. Correct.

(Continued on next page to include jurat.)

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MR. SACKS: I have nothing further.

MR. WALTHALL: Thank you.

THE VIDEOGRAPHER: We're off the record at 2:38 p.m.

(Whereupon, at 2:38 p.m., the Examination of this witness was concluded.)

____

PETER L. VARRIALE, M.D.

Subscribed and sworn to before me

this _____ day of ________, 20___.

____

NOTARY PUBLIC

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E X H I B I T S

DEFENDANTS' EXHIBITS:

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A	Dr. Varriale's report.	29

PLAINTIFF'S EXHIBITS:

EXHIBIT	EXHIBIT DESCRIPTION	PAGE
1	Dr. Varriale's report included in Rule 26 exchange.	37

C E R T I F I C A T E

STATE OF NEW YORK)
: SS.:
COUNTY OF QUEENS)

I, MARY ROBOLD, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of March 2012.

____
MARY ROBOLD